

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 28th February, 1996.

CRIMINAL APPEAL NO. 6 OF 1988

For Approval and Signature:

THE HON'BLE MR. JUSTICE R.R. JAIN

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

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Shri J.V. Desai, Advocate for the appellant.

Shri K.P. Raval, APP for the respondent.

Coram: R.R. Jain, J. & H.R. Shelat, J.  
(28-2-1996)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The appellant was tried in Sessions Case No. 22 of 1987 on the file of the Court of the Additional Sessions Judge, Sabarkantha at Himatnagar and came to be convicted on 16th December 1987 of the offences under Section 302, 307 and 325 of Indian Penal Code. He has been sentenced for the offence under Section 302, to rigorous imprisonment for life and fine of Rs.100/- in default rigorous imprisonment for one week more, and

for the offence under Section 307, IPC he has been sentenced to rigorous imprisonment for 5 years and fine of Rs.100/-, in default rigorous imprisonment for one week more. He is also sentenced to rigorous imprisonment for one year and fine of Rs.100/- in default rigorous imprisonment for one week more for the offence under Section 325, IPC. Being aggrieved by the judgment and order of conviction and sentence, the present appeal has been preferred before us.

2. Becharbhai Thavrabhai the deceased and appellant were the cousins. Laxmiben aged about 3 years is the daughter of the appellant. Kanu and Mohan are the sons of the appellant. Mohan was hurt by burning owing to hot milk. As he was ailing Manguben Ramjibhai had gone to see him on 10th January 1987 in the morning at 8.00 a.m. At that time, the appellant and his wife were quarrelling. She therefore went to the field of the deceased where deceased, his wife Valiben and others were doing their agricultural works. They were also repairing the basin of the Well which was damaged. Manguben going to the field requested the deceased to go with her as the appellant was quarrelling saying that some thing wrong was going on. The deceased then went to the place of the appellant. Valiben and her son Shankarbhai also followed the deceased. They could see that appellant and his wife were quarrelling. The deceased therefore questioned why they were bickering ? The wife of the appellant then replied that the appellant wanted to take bath and that was their bloodsucking issue. The deceased then sat into the courtyard and asked the wife of the appellant to bring water. A bucket of water was then brought and then Valiben and wife of the appellant bathed him. Thereafter changing the dress accused brought four incense sticks and thrust into the frame of the door. The appellant and the deceased then smoke bidi. Suddenly the appellant got up, went into his house and brought the axe. To the surprise of all he gave the axe blow on the head of the deceased. The blunt portion of the axe struck the deceased with the result he fell down and sustained bleeding injury. Valiben tried to rescue. She also met with the same fate. She also sustained the injury caused by the axe. At that time Shankarbhai the son of the deceased and Dhuliben the wife of Shankarbhai came there and they rescued all. The appellant then took her daughter Laxmiben inside the house and bolted the door from inside. Those who were outside then heard screams of Laxmiben. Shankarbhai Becharbhai, Shankarbhai Kodharbhai, Dhanjibhai Kalaji and others knocked the door considerably but the appellant did not open. Hence Ramjibhai and Shankarbhai Kodharbhai climbed over the roof, cut of the rafters and entered into the house. They could see that there was incise wound on the neck of Laxmiben. The appellant was armed with a sword. The cot and quilt were burnt. With difficulties they could save Laxmiben. Snatching Laxmiben from the appellant she was brought out. The injured Laxmiben, Valiben and the deceased were taken to the hospital at

Himatnagar. As the deceased was seriously injured she was shifted to Ahmedabad where he died during the course of the treatment. A complaint was then lodged before Shamlaji police station. The police officer inquired into the offence registered and filed the chargesheet before the court of the Chief Judicial Magistrate (First Class) at Himatnagar against the appellant of the offences under Section 302, 307 and 325 of IPC, and also under Section 135 of the Bombay Police Act as appellant had also committed the breach of the notification issued by the District Magistrate of Sabarkantha district. The case was then committed to the Court of Sessions at Himatnagar as the 1d. Magistrate was having no jurisdiction to hear and decide the case. That case came to be registered as Sessions Case No. 22 of 1987. It was assigned to the then Additional Sessions Judge at Himatnagar for hearing and disposal in accordance with law. After the hearing was over, the learned Judge appreciating the evidence found that the prosecution had succeeded in bringing the guilt home to the appellant. He therefore convicted the appellant and sentenced aforesaid. It is against that judgment, the present appeal is before us.

3. Mr. J.V. Desai, 1d. advocate for the appellant assailed the judgment and order of the lower Court on 2-3 counts submitting that the appreciation of the evidence was perverse and arbitrary. The witnesses were interested and ought not to have been relied upon without any independent corroboration. The case in defence ought to have been considered.

4. We will be dealing about the last point first. It is submitted in defence that between the deceased and the appellant the Well in the field was common and the appellant had caused damage to the basin of the well. In that regard the deceased had gone to rebuke and had chided the appellant rudely. There was therefore quarrel and thereafter while repairing the well the deceased sustained the injury but owing to ill-will the appellant was wrongly involved. We do not find any material on record showing the defence probable. Without any plausibility simply to suggest the case while cross-examining the witnesses of the prosecution is not sufficient. It may be stated that witnesses examined have negatived the truth of the case in defence. However that cannot absolve the prosecution from discharging the burden to prove the charge beyond reasonable doubt, as in law the prosecution cannot take advantage of the weaknesses in defence or incredible defence.

5. We have carefully scrutinised the evidence on record and no doubt is left in our mind about the correctness of the order passed. The learned Judge has rightly appreciated the evidence on record and reached to the correct logical conclusions. Valiben Becharbhai the injured is examined at Exh.11. Laxmiben being the minor aged about 3 years is not examined as she was found not competent and naturally she being of a tender age would

not be in a position to testify the case of the prosecution though injured. Shankarbhai Becharbhai the son of the deceased is examined at Exh. 18. Shankarbhai Kodharbhai is examined at Exh. 22 and Dhanjibhai Kalaji Damor is examined at Exh.9. Valiben Becharbhai (Exh.11) has supported the prosecution case in clear terms which we have hereinabove shortly stated. Accordingly Shankarbhai Becharbhai has also supported the case of the prosecution unequivocally. Shankar Kodhar hearing the uproar went to the place of the appellant. He could see the smoke billowing out of the house. He tried to open the door but failed. Ramjibhai had also gone there. He and Ramjibhai then thought it fit to enter into the house removing the roof. Both climbed over the roof and cutting the rafters Shankarbhai Kodharbhai entered into the house where he could see the appellant with sword in his hand. The quilt was burnt and the cot too. On the neck of Laxmiben bleeding injury was found. He snatched Laxmiben from the grips of the appellant and passed her on to Ramji who with care took Laxmiben out. Thereafter the door was opened and the appellant was caught hold of. Dhanji Kalaji Damar (Exh.9) heard the hue and cry when he was passing by the road. He went to the house of the appellant. He found the deceased in wounded condition. He therefore questioned to which the deceased replied that the appellant had caused him the injury by giving axe blow. He had tried to separate the warring spouses and therefore he was attacked and injured. This witness could see the appellant taking Laxmiben into the house and then bolting the house from inside. This witness also heard yells of Laxmiben and could see that Ramjibhai and Shankar Kodhar had gone over the roof and entered into the house breaking the rafters. In the cross-examination neither of the witnesses has been shaken. All have stood firm and have stated the truth without being influenced by any preconceived notions or prejudices. When we perusesd the evidence of all these witnesses, we find no reason to discard the same. On the contrary we find that leaving no room to doubt their evidence inspires confidence being credible and trustworthy. The learned Judge has therefore rightly relied upon that evidence and has reached to the correct conclusion. It may be stated that Dr. R.S. Bhise (Exh.19) carried out the postmortem. His evidence reveals that on the person of the deceased there were fatal injuries and because of those injuries the deceased died. The injuries were also sufficient to cause death in ordinary course of nature. Dr. N.S. Rathod (Exh.25) examined Valiben and Laxmiben and he has also supported the case of the injuries and the weapon with which the injuries can be caused. In the presence of Nemabhai Dhanabhai (Exh.12) and another, the panchnamas were drawn. While drawing the panchnama of the scene of offence the police found blood in the courtyard of the appellant which was seized by scrapping the cow-dung flooring. The ceiling was found opened because the rafters were cut of and Ramji and Shankarbhai had entered into the house. While drawing another panchnama (Exh.14) the accused produced a

sword and an axe which were seized by the police but blood marks were not found. The clothes of the deceased were seized after the doctor gave it to the concerned police constable. They were bloodstained. When panchnama about the physical condition of Laxmiben was drawn which is produced at Exh.15, it was found that on certain parts of her body were burnt. The Chemical Analyser (Exh.38) found blood group 'B' on the mud, dhoti and jacket sent for chemical analysis which was the blood group of the deceased. Thus other evidence on record supports the abovesaid witnesses. On query the learned Advocate representing the appellant then failed to satisfy us as to how the learned Judge fell into error in appreciating the evidence and reaching to the conclusions against the appellant.

6. It seems the only weapon to have aegis with defence is to assail the evidence on the ground of interestedness, or relationship. According to him, Valiben is the widow of the deceased and Shankarbhai Becharbhai is the son of the deceased. Because of the close relationship they supported the case of the prosecution and others supported these two witnesses as they were affiliated to the common group. Simply to allege so is not sufficient, because in law the evidence of the relatives or of a common group cannot be thrown overboard simply on the ground of relationship or interestedness. The court has to scrutinise the evidence of such witnesses with extra care and caution and if by doing so the court finds that the evidence of the relatives is credible, appealing, and free from doubt certainly it is open to the Court to place reliance on such evidence and conclude what is logically possible. We are fortified in our view by a recent Judgment of the Apex Court in the case of Wariyam Singh & Ors vs. State of U.P. - JT 1995 (7) S.C. 117. Here, we have with finicky details and meticulous care scanned the evidence of all the witnesses and especially evidence of Valiben and Shankarbhai, but we do not find any infirmity in their evidence. They are consistent all throughout and are also supported by the medical evidence as well as the opinion expressed by the Chemical Analyser. They are also supported by the marks of situation that came into being after the incident occurs. The evidence of the witnesses therefore cannot be brushed aside simply on the ground that they are relatives or interested.

7. Mr. Desai next submitted that the sentence inflicted by the lower Court might be altered to the offence of a lesser punishment. We see no reason to accept the contention. About the applicability of a particular penal provision, the intention of the wrong-doer plays pivotal role. The intention is certainly the internal and invisible process of the mind of the offender and that has to be ascertained by the visible and external acts appearing on record. Here in this case on hand the appellant was often quarrelling with his wife and once on such occasion Manguben (Exh.21) suddenly reached there as she wanted to see

Mohan who was ailing because of burns he had sustained. She could see that both the spouses had gone to the extreme and therefore intervention of the deceased was necessary to pacify them. She went to the field of the deceased where he was available and urged him to go to the appellant as some thing alarming was being done. The deceased therefore went to the appellant. His wife and his son also followed him. They all tried to bring the appellant to reason and to pacify him. He was then made to take bath. After the bath both smoke bidi together. Sometimes thereafter the appellant went inside the house, brought the axe and committed the above said wrongs. Not only that but he also took his small baby aged about 3 years Laxmiben inside the house, bolted the door from inside, and then by a sword or by a sharp-cutting instrument tried to cut of the neck, but fortunately Laxmiben could be saved as by the time Shankarbhai Kodharbhai and Ramji could succeed in entering the house by breaking the rafters of the roof. By that time considerable damage to the small child was caused because some parts of her body were burnt. What can hence be deduced is that as the deceased reached there in the nick of time, appellants's plan was defeated. He was hence painfully anguished and was eating his heart out. While smoking bidi unquenched ill-will deflagrated in his mind and then excogitating and shaping the same with a vengeance he did the wrong, he could not abnegate the kink. When in such ferocious and brutal manner the wrong is done, his intention can be no less than alleged by the prosecution. Deliberately he caused the injury to the deceased by a blunt portion of the axe violently. Blood was coming out of the head of the deceased, as a result the deceased became unconscious. Naturally therefore the intention was to kill. Not only that but when Valiben tried to intervene she also met with the same fate but luckily survived. Thereafter the target was Laxmiben. When in such succession the appellant has done the wrongs giving vent to his kink unflinchingly, his intention that can be spelt out is to commit murder. It cannot be said that it was out of his knowledge, if Laxmiben had died because of the injuries he had inflicted, he would have been held guilty of committing the murder. It may further be stated that there was no provocation from the side of the injured or deceased, and the incident did not happen at the spur of moment. In short everything has been done deliberately. In view of the matter, the submission cannot be accepted and it cannot be held that the appellant was having the intention to commit the lesser offence and not the offences alleged.

8. No other submission was made by either of the parties before us. For the reasons stated hereinabove, we find that the learned Judge has fallen into no error and his judgment and order suffers from no infirmity. There is therefore no reason to upset the conviction and sentence inflicted. The appeal is devoid of merits. In the result, the appeal is hereby dismissed. The

judgment and order of the lower court convicting and sentencing the appellant are hereby maintained.

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